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Criminal Law--Confinement in the Penitentiary Without Indictment--Escape from Illegal Custody

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fact that counsel in the *Rose* case brought out the possibility of conflicting interests before the case went to trial. This action was in accord with the American Bar Association Canons of Professional Ethics, Canon No. 6 (1957), which says it is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Under this canon a lawyer "represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose." Unlike the *Rose* case, counsel for the defense in the principal case was not faced by such a conflict merely because the codefendants entered unlike pleas, nor did such a conflict arise during the trial. The decision reached by the supreme court in the principal case is obviously a sound one.

T. E. P.

CRIMINAL LAW—CONFINEMENT IN THE PENITENTIARY WITHOUT INDICTMENT—ESCAPE FROM ILLEGAL CUSTODY.—Relator, a 16 year old youth, was adjudged a delinquent and sentenced to the West Virginia industrial school for boys by the juvenile court of Ohio County. Conviction was for the theft of an automobile and was based on a plea of guilty and testimony of the arresting officer. Relator was later certified as an incorrigible and was returned from the school to the juvenile court which thereupon sentenced him to the West Virginia penitentiary and issued commitment thereon. While serving his sentence in the penitentiary, relator escaped and, upon recapture, was indicted and sentenced to an additional fifteen months for the escape. On a writ of habeas corpus, the court *held* that the relator had been sentenced and committed to the penitentiary without an indictment in violation of W. VA. CONST. art. III, § 4, and that he could not, therefore, be guilty of an escape. The prisoner was ordered discharged. *State ex rel. McGilton v. Adams*, 102 S.E.2d 145 (W. Va. 1958).

There are at least two distinct problems presented by this case. The first, which involves the pertinent statute that permits juveniles to be imprisoned in the penitentiary, can be disposed of quickly. W. VA. CODE c. 28, art. 1, § 7 (Michie 1955), allows an incorrigible in the West Virginia industrial school for boys to be "returned to the court by which he was committed to the school, and such court shall thereupon pass such sentence upon him

as to confinement in the penitentiary as may be proper in the premises, or as it might have passed had it not committed him to the industrial school." W. VA. CONST. art. III, § 4, provides that "no person shall be held to answer for treason, felony or other crime, not cognizable by a justice, unless on presentment or indictment of a grand jury." W. VA. CODE c. 62, art. 2, § 1 (Michie 1955), provides that "the trial of a person on a charge of felony shall always be by indictment." Such an indictment is a condition precedent to a conviction of a felony. *State v. McGraw*, 140 W. Va. 547, 85 S.E.2d 849 (1955). On its face, W. VA. CODE c. 28, art. 1, § 7 (Michie 1955), seems to offer a proper and expeditious course, but surely the legislature could not have intended the statute to be operative in a manner depriving the accused of basic constitutional rights.

The second problem, perhaps more thought provoking, involves the question of whether a prisoner in custody who effects an escape, is guilty of the escape or any other crime committed while so escaping or attempting to do so. In the principal case, the prisoner was in the unique position of being in the penitentiary without any indictment at all against him, and therefore, the court held, he had the right to escape from this illegal detention. Only one other West Virginia case dealt with an escape from illegal custody. The case of *State v. Pishner*, 72 W. Va. 603, 78 S.E. 752 (1913), was mentioned in the instant case, but the court here refused to approve, disapprove, or comment thereon. In the *Pishner* case, the defendant escaped pending action on a writ of error to a judgment of conviction for a felony, which judgment was subsequently reversed. In a 3 to 2 decision, the defendant was held to be not guilty of an escape. Judge Browning in the principal case, at page 148, noted: "It is sufficient to say that there is a vast difference between a void sentence, which may be reached by habeas corpus, and a sentence under a valid indictment, improper because of reversible error committed by the trial court, which is cognizable in this Court only upon a writ of error."

In other jurisdictions, the cases do not seem to go as far as the *Pishner* case, though there are a few which have held a conviction for escape to be erroneous due to the gravity of the error of the original confinement.

In *People v. Ganger*, 97 Cal. App. 2d 11, 217 P.2d 41 (1950), an information against the defendant was not filed within the specified time period, nevertheless the defendant was guilty of an escape. In

People v. Hinze, 97 Cal. App. 2d 1, 217 P.2d 35 (1950), there was an irregularity in the sentence making the conviction voidable, but the defendant was guilty of an escape. A similar ruling was handed down in *People v. Darnell,* 107 Cal. App. 2d 541, 237 P.2d 525 (1951). *Bayless v. United States,* 141 F.2d 578 (1944), held that a sentence which was irregular or voidable was not a defense to a charge of escape, and the court said, at page 579, "a difference of opinion might cause a death." *State v. Palmer,* 45 Del. 308, 72 A.2d 442 (1950), held that a commitment, void on its face, is justification for an escape, but where there is a mere informality or irregularity in the process of commitment, arrest, or information, a defense of justification for escape is not sufficient. Again in *Commonwealth ex rel. Penland v. Ashe,* 142 Pa. Super. 403, 17 A.2d 244 (1941), where the indictment did not substantially comply with the statute, the defendant was guilty of an escape.

Similar to the *Pishner* case, are *Moore v. Commonwealth,* 301 Ky. 851, 193 S.W.2d 448 (1946); and *Jones v. State,* 158 Miss. 366, 130 So. 506 (1930), where the escapes were made pending appeals to convictions which were subsequently reversed. In the *Moore* case, the court cited the *Pishner* case, but refused to follow it, stating that the *Pishner* case was the minority rule.

A conviction and confinement by a mayor's court without a jury for an assault and battery constituted illegal custody under a statute requiring legal custody as a prerequisite for the offense of escape. *State v. Ferguson,* 100 Ohio App. 111, 135 N.E.2d 884 (1955). *People v. Ah Teung,* 92 Cal. 421, 28 Pac. 577 (1891), a leading case, held that the offense of escape requires legal custody, and where the defendant is held without even the color of authority, a conviction for an escape cannot be sustained. *Accord, Housh v. People,* 75 Ill. 487 (1874); *State v. Beebe,* 13 Kan. 437 (1874). In such a case, the escapee may use such force as is necessary to secure his liberty. *State v. Leach,* 7 Conn. 452 (1829).

Though there are some jurisdictions today which would not permit an escapee to justify his flight by claiming illegal custody, the majority distinguish between the cases where the original conviction was void or merely voidable. An escape under a void conviction would provide a defense to the offense of escape, whereas the escapee under a voidable conviction would have no such defense.

The advisability of ever permitting an escapee to use his illegal confinement as a defense is seriously questioned. Although legal

means of gaining release from confinement are not always adequate, when balanced against possible consequences of permitting the illegal custody to be used as a defense to the escape, there is no question as to which is the better course. A prisoner, knowing he may have such a defense if he escapes and is recaptured, might be prone to try the escape first, and then, if recaptured, seek his legal remedy. Assume a prisoner following such a course attempts an escape and is halted by an armed guard. In his anxiety, he slays the guard. Could he then claim he was illegally confined and had every right to use all the force necessary in attempting to gain his liberty? If such is the case, any force which he uses up to and including homicide becomes an act of self-defense. In *Meirs v. State*, 34 Tex. Crim. 161, 29 S.W. 1074 (1895), the defendant, in seeking freedom, shot and killed a deputy sheriff who was attempting to take the defendant into custody without a capias. The Texas court there held it was self-defense. Would the West Virginia court so hold today?

I. A. P., Jr.

CRIMINAL LAW—RIGHT TO A PUBLIC TRIAL—COURTROOM BARRED TO PUBLIC.—The defendant sought to waive her right to a public trial during a murder prosecution so that she could testify in her own behalf concerning certain abnormal sexual practices. The trial court granted the motion and the public was excluded in order to prevent emotional disturbance to the defendant. The defendant was found guilty and the petitioners, certain members of the public, sought a ruling on the exclusion order. *Held*, that it was within the discretion of the court to exclude the public during the time the defendant was on the stand, but, in the light of a statutory provision providing for open court, the trial judge's order was too broad. The exclusion should have been limited to the time during which the defendant testified. *Kirstowsky v. Superior Court*, 143 Cal. App. 2d 745, 300 P.2d 163 (1956).

In this decision the court was faced with the task of balancing two principles, the extent of the constitutional guarantee to a public trial and the interest of the public to see that justice is done. A better understanding of this problem may be had by briefly examining the treatment given these principles in other courts.

In federal law the Constitution guarantees that, "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public